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In the Supreme Court of the United States

OCTOBER TERM, 1984

LEONARD R. CHEREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court abused its discretion by declining to answer an ambiguous question from the jury during its deliberations.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 734 F.2d 1248.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1984, and a petition for rehearing was denied on October 10, 1984.[1] The petition for a writ of certiorari was filed on Monday, December 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted of fraudulent concealment of assets belonging to a

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[1]The order of the court of appeals denying rehearing (Pet. App. B1) is dated September 19, 1984, but we are informed by the clerk of the court of appeals that the order was actually entered on October 10, 1984.

bankrupt estate, in violation of 18 U.S.C. 152. He was sentenced to imprisonment of one year and one day, to be followed by three years' probation, and a $5,000 fine.

1. The evidence at trial is summarized in the opinion of the court of appeals. Briefly, it showed that in 1977 petitioner transferred his part ownership in Custom Drywall, Inc. to his co-owner, William Currier. As part of the consideration for the sale, Currier transferred title to a 1974 Jaguar automobile, which had been owned by Custom Drywall but used by petitioner, to a second corporation, Delta Plumbing, Inc., of which petitioner was president and the major shareholder. Pet. App. A2-A3. Petitioner continued to use the car for both personal and corporate purposes; Delta paid all insurance, fuel, and repair expenses and carried the car on its books as an asset. Delta also owned a second automobile, a 1973 Thunderbird, used by Edmund Johnson, the co-owner of Delta. Pet. App. A3.

In April 1979, when Delta was facing financial difficulties, petitioner gave possession of the Jaguar to a friend, Donna Taylor. Title to the car remained with the corporation. On July 2, 1979, Delta filed a petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.* Neither the Jaguar nor the Thunderbird appeared on the schedule of assets submitted as belonging to the corporation. Johnson, however, subsequently returned the Thunderbird to the bankruptcy estate. Pet. App. A3.

Petitioner executed the required "Statement of Affairs for Debtor Engaged in Business." On the form appeared the following Question 8 (Pet. App. A3):

> 8. Property held for another person. What property do you hold for any other person? (Give name and address of each person, and describe the property, the amount of value thereof and all writings relating thereto.)

Petitioner answered (Pet. A4):

> Leased trucks — Kayser Leasing Co. two leased trucks; valued at $6000; covered by conventional lease documents[.]

On the form also appeared the following Question 14(a) (Pet. App. A4):

> a. Have you made any gifts, other than ordinary and usual presents to family members and charitable donation, during the year immediately preceding the filing of the original petition herein? (If so, give names and addressess of donees and dates, description, and value of gifts.)

Petitioner answered (*ibid.*): "none."

Five days after filing the petition, Delta transferred title to the Jaguar to Donna Taylor, without consideration (Pet. App. A3, A4). Taylor kept the car for several months, but in late summer or early fall of 1979, she gave the car to one of petitioner's attorneys as collateral for attorney's fees. In 1981, Taylor transferred actual title to petitioner's attorney, who credited the value of the vehicle to petitioner's account. Pet. App. A4.

2. During its deliberations, the jury made three requests of the court, only one of which is at issue here. First, the jury requested a copy of the indictment. After consulting with the attorneys, the court denied the request (Tr. 70). Shortly thereafter, the jury submitted two additional questions. One question dealt with a specific area of bankruptcy law that, as both parties agreed, was not germane; an answer would be "complex" and "might confuse them more" (Tr. 72).

The other question read as follows (Pet. App. A5; Tr. 71):

> On page 3 of the bankruptcy pet. does question 14 include the transfer of personal assets of the corp. officers?

The prosecutor objected to any response to the question other than an instruction that the jury would have to consider the evidence as the jurors remembered it and the instructions as given by the court (Tr. 71). He stated that the question "doesn't really have anything to do with the case. It is outside the evidence that's there" (*ibid.*). Defense counsel initially requested that the court answer the question with a simple "no" (*id.* at 72, 74), noting that the jury was evidently "troubled" and "might go down the wrong road" (*id.* at 74). After lengthy discussion, however, defense counsel proposed that the court decline to answer the question "without explanation" and without referring back to the indictment, and inform the jury that the question was not "within the province of the Court" (*id.* at 77). The district judge agreed, restating the proposal in words similar to those used by defense counsel. Defense counsel then stated, "I have no problem with that, Your Honor" (*ibid.*). The prosecutor also stated, "No problem, Your Honor" (*ibid.*). There was no further discussion of the matter. See Pet. App. A5-A6.

3. A divided panel of the court of appeals affirmed petitioner's conviction, holding that the trial judge properly declined to answer the jury's question regarding the meaning of Question 14. The court found that the question posed by the jury was "potentially misleading" and "not useful to the performance of its designated task" (Pet. App. A7). Taken literally, the question simply "had nothing to do with the time frame of the prosecution" (*ibid.*).[2] Even assuming that the jury could have thought that the question referred to Delta's transfer of possession, without title, to Taylor in April 1979, the court concluded that a simple "no" answer

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[2]Question 14 referred to gifts made in the year preceding the petition for bankruptcy; the transfer of title to the Jaguar to Donna Taylor took place in the week following the petition.

could have been misleading to the jury. While the jury could have construed the answer as evidence that petitioner subjectively believed the Jaguar belonged to him (thus explaining the negative response to Question 14), the jury could also have viewed the answer as "substantial evidence of concealment of an asset by a failing corporation" (Pet. App. A8). By declining to answer the question, "[t]he judge avoided placing undue emphasis on an apparently misdirected line of inquiry" (*ibid.*). That decision, according to the court of appeals, was "well within the boundaries of his discretion" (*ibid.*).[3]

ARGUMENT

Petitioner contends that the trial court abused its discretion by failing to give a supplemental instruction answering the jury's inquiry concerning the scope of the question in the bankruptcy petition. This contention raises no significant issue of law and was not properly preserved for appeal by timely objection. Moreover, the issue was correctly decided by the court below. Further review by this Court is not warranted.

1. The legal standards applicable to the trial court's determination whether to provide supplemental instructions to the jury are well settled. See *Bollenbach* v. *United States*, 326 U.S. 607 (1946). While the trial court has the responsibility of giving the jury "the required guidance by a lucid statement of the relevant legal criteria" (*id.* at 612), it must exercise caution lest it mislead the jury or interfere with the jury's exclusive role as factfinder. As one court has stated:

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[3]Senior District Judge Marovitz, without referring to petitioner's failure to object, dissented on the ground that the jurors were "confused" (Pet. App. A15) and that the lack of a supplemental instruction on Question 14 made it difficult for them "to understand [petitioner's] theory of the case" (*id.* at A13).

> A trial judge is often reluctant to respond to questions in language similar to that used by the jury, particularly where inquiries are phrased as hypothetical cases or as questions requiring a categorical yes or no answer. Questions or illustrations from the jury may be phrased so that a simple affirmative or negative response might favor one party's position, place undue weight on certain evidence, or indicate that the trial judge believes certain facts to be true when such matters should properly be determined by the jury. Because the jury may not enlist the court as its partner in the fact-finding process, the trial judge must proceed circumspectly in responding to inquiries from the jury.

United States v. *Walker*, 575 F.2d 209, 214 (9th Cir.), cert. denied, 439 U.S. 931 (1978); see *United States* v. *Papia*, 560 F.2d 827, 843-844 (7th Cir. 1977).

Petitioner does not claim, and cannot, that the court of appeals openly deviated from these settled principles. The court's opinion cites and applies the correct legal standards.[4] Rather, petitioner asks this Court to engage in a detailed inquiry into the specifics of this case, under which, he claims, the failure of the trial court to answer the jurors' question might be seen to have "misled them to believe that the offense also included the personal assets of corporate officer within its scope" (Pet. 18). Petitioner disagrees (Pet. 19-20) with the court of appeals' conclusion that the jury's question, as phrased, was irrelevant to the charge, and contends (Pet. 20), contrary to the court of appeals, that the risks of misleading the jury by not responding were greater than the risks of responding. At most, therefore, petitioner's argument is that the court of appeals incorrectly applied

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[4]Petitioner acknowledges (Pet. 19) that the court of appeals "cit[ed]" the correct legal standard—that of *United States* v. *Bolden*, 514 F.2d 1301 (D.C. Cir. 1975)—but contends (Pet. 19-20) that the court's distinction of *Bolden* was not persuasive on the facts. See note 4, *infra*.

settled principles to the specific facts of this case.[5] That claim does not warrant review by this Court.

2. Petitioner failed to object to the trial court's response to the jury when made. Indeed, the answer given the jury was first suggested by defense counsel, who then expressly stated that he "ha[d] no problem with" the proposed response (Tr. 77). Under Fed. R. Crim. P. 30, "[n]o party may assign as error any portion of the charge or omissions therefrom unless he objects thereto * * *, stating distinctly the matter to which he objects and the grounds of his objection." The trial judge below conscientiously discussed proposed supplemental instructions with counsel for both sides, and did not reach a decision until both sides expressly approved of the proposed disposition. Having first proposed and then expressly agreed to the trial court's response at the time when it was possible to make changes and thus eliminate the possibility of error, petitioner should not now be permitted to obtain a reversal and retrial on that ground. Petitioner is foreclosed from raising the issue on appeal unless it constitutes plain error—which petitioner has not been so bold as to suggest. See *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 13-15; *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); Fed. R. Crim. P. 52(b).

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[5]The conflicts petitioner alleges between the decision below and *United States* v. *Bolden, supra*, and *Powell* v. *United States*, 347 F.2d 156 (9th Cir. 1965), are entirely based on the factual differences between the cases. As the court of appeals noted (Pet. App. A7), in *Bolden* "the jury asked a perceptive question about a matter directly germane to the issues it had to resolve," while here the jury's question "was not useful to the performance of its designated task." Similarly, in *Powell*, the jury's request was a pertinent inquiry about when the requisite intent must have been formed in a Mann Act prosecution. Here, the question was one of interpretation of evidence, and was of such an ambiguous character that any simple response would have been potentially misleading.

3. In any event, the decision below is clearly correct. While the trial court has a duty to issue supplemental instructions, under certain circumstances, in order to clarify the legal principles applicable to a prosecution (*United States* v. *Bolden, supra; Powell* v. *United States, supra*), here the jury's question pertained to interpretation of an evidentiary exhibit—not to deficiencies in the court's instructions. Any simple answer the trial court might have given posed serious risk of influencing the jury's factfinding. Moreover, the question, as phrased, simply "had nothing to do with the time frame of the prosecution" (Pet. App. A7), since the transfer of title to the Jaguar to Taylor took place after, rather than before, the petition for bankruptcy. But even assuming that the jury mistakenly were thinking that transfer of possession, without title, might fall within the scope of Question 14, the apparently simple "no" answer to the question would have been potentially misleading. The jury might well have concluded, under that "misdirected line of inquiry" (Pet. App. A8), that petitioner's answer to Question 14 was "substantial evidence of concealment of an asset by a failing corporation" (*ibid.*). Under the circumstances, it was well within the trial judge's discretion, as the court of appeals held (*ibid.*), to decline to answer so ambiguous a question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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